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SUPREME COURT U

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THE UNITED STATES

vs.

THE WM. CRAMP & SONS SHIP AND ENGINE BUILDING COMPANY,

AND

WM. CRAMP & SONS SHIP AND ENGINE BUILDING COMPANY,

vs.

THE UNITED STATES.

Petition for Rehearing by The Wm. Cramp & Sons Ship and Engine Building Company.

HOLMES CONRAD,
JOHN C. FAY,
EPPA HUNTON,
C. E. CREECY,
Atty., and of Counsel for the Cramp Co.

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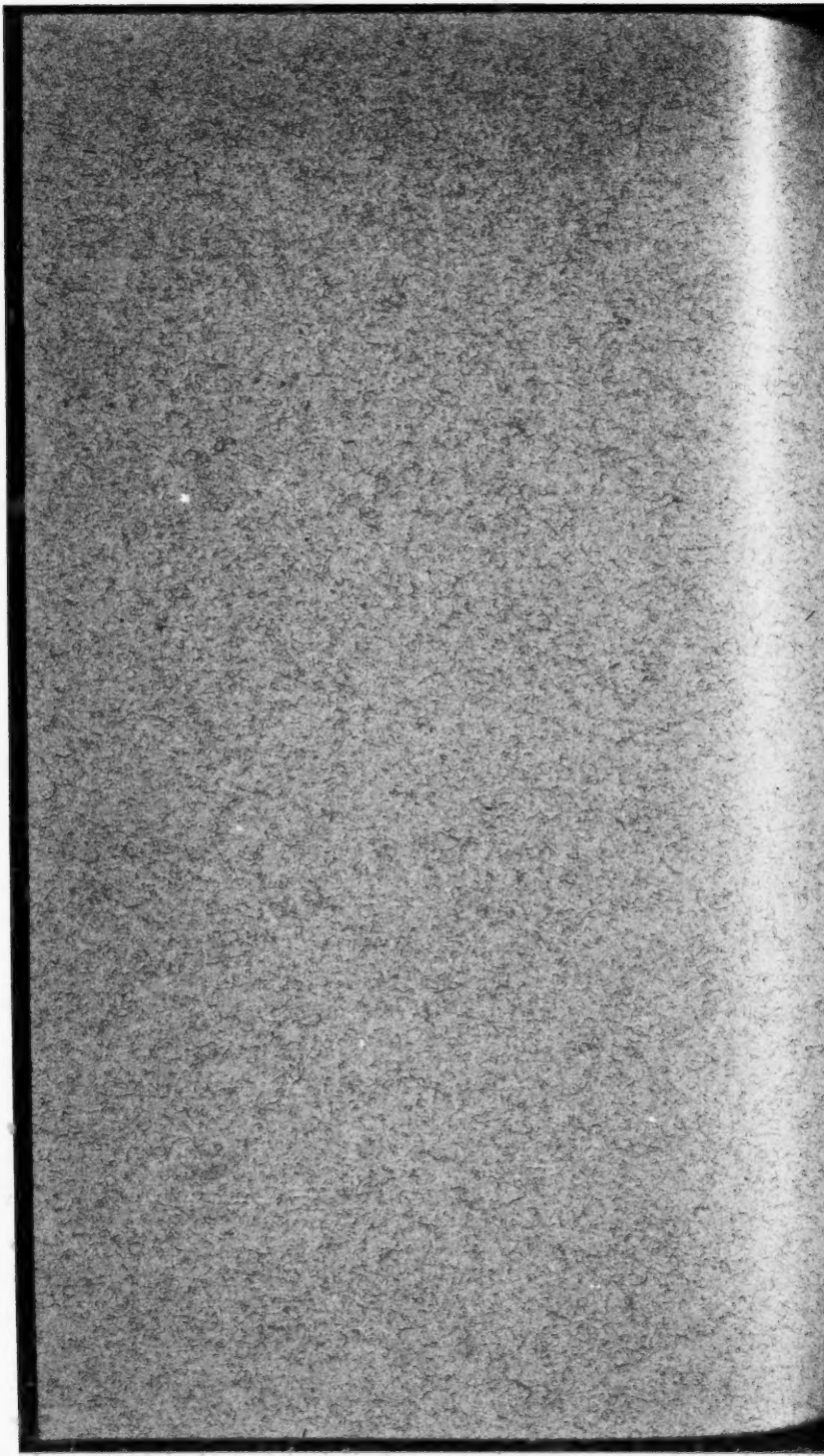

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The William Cramp & Sons Ship and Engine Building Company, respectfully pray that a rehearing be allowed in the two above-entitled causes, in which the opinion and judgment of this court were announced on the 13th day of May, 1907. They are advised that such rehearing should be allowed on the following grounds, viz:

The course of reasoning, as shown by the opinion of the court, on which its judgment is founded, discloses

such a disregard of certain material facts, and misinterpretation of others, as warrants the belief that these cases have not received from the court that degree of consideration which the rights of the petitioners and the magnitude of the interests involved are entitled. The court announces, in the opening of its opinion, as its view of the case—

> "This case turns on the release executed by the building company on May 13, 1896."

And further—

> "That which was to be released was all claims of any kind or description, under or by virtue of said contract. Manifestly included within this was every claim arising not merely from a change in the specifications, but also growing out of delay caused by the Government. The language is not alone 'claims under,' but 'claims by virtue' of the contract . . . 'claims of any kind or description.' All the claims for which allowance was made in the judgments of the Court of Claims, come within one or the other of these clauses. It may be that, strictly speaking, they were not claims under the contract, but they were clearly claims by virtue of the contract. Without it no such claims could have arisen."

The exact language of the contract, in the sixth paragraph of the nineteenth article, is:

> ". . . on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract."

And the court adds, in the opinion, that—

> "Stipulations of this kind are not to be shorn of their efficiency by any narrow, technical, and close construction."

Petitioner has no disposition to invoke such rule of construction, nor does it appreciate the subtle refinement of the fancied distinction between the words "under" and "by virtue of." Petitioner asks for no other rule than that so often laid down by this court in other cases, and which as late as in United States *vs.* Stage Company, 199 U. S., 423, it expressed as follows:

> "The same principles of right and justice which prevail between individuals, should control in the construction and carrying out of contracts between the Government and individuals."

It wishes to be protected from that construction which was reprobated by this court in the Manufacturing Company *vs.* United States, 17 Wall., 595, where, in a case like this in many features, this court, through Mr. Justice Miller, said, speaking of the judgment under review:

> "But this is a narrow and incomplete view of the contract. It leaves out the claimant's right in the matter."

That is the objection which petitioners respectfully now urge to the opinion and judgment of the court in these cases.

Petitioner now says, in support of its prayer for a rehearing of these cases, that the claims asserted and demanded in these causes are not "claims under or by virtue of the contract." They have no connection with the contract. They might readily have accrued had the contract never existed. They are for money paid out at the request, and for the sole use and benefit of the United States, by claimant, after the expiration of the contract period.

By the terms of the contract, it was provided that the vessel—

> "shall be completed and ready for delivery to the United States on or before the expiration of three years from the date of this contract"—

that is by November 19, 1893. It was not completed before November 19, 1895.

The Court of Claims found as a fact that—

> "By reason of the failure of the defendants to furnish the materials, which, by the third clause of the contract they had agreed to furnish, within the time and in the order, as aforesaid, the completion of the vessel was delayed for two years beyond the contract period."

The third clause of the contract, which is by far the most important and controlling clause in the contract, appears to have escaped altogether the attention of the court. It expressly provides that if the contractors complete the vessel, except as to the fitting of the armor, and the United States have failed, at the time of such completion to furnish the armor, that then the contractors *shall* have a trial trip, and if on such trial the vessel be found complete, except as to the armor, *said vessel shall be finally accepted*, and the cost of fitting the armor shall be ascertained, and then deducted from the contract price.

The vessel was ready and tendered for the trial trip, but the same was not allowed under conditions, already pointed out in the briefs, and which are not creditable to the then representatives of the United States.

After the contractors had performed the contract on their part, and after the vessel was completed, except as fitting the armor, and after the contractors had been allowed $2,700,000 of the $3,000,000, the contract price, and after the vessel had thereby become the absolute property of the United States, and after the contract period had long expired. Then the question arose, "what is to be done with this vessel?" The United States had not furnished the armor as it had agreed. It informed the contractors that they did not know when they could fur-

nish the armor. The time was unknown, indefinite, unascertainable by the United States or the contractor. What shall be done with this vessel during this uncertain and indefinite period? How is it to be protected, guarded, preserved, and insured? There was nothing in the contract requiring the contractors to do it. The contractors had no insurable interest in it. They had no lien on it. They had been allowed the full amount of money earned by them under the contract (although the United States yet retained in its hands certain per cents of it for security). It can not be disputed that, as a matter of legal right, the contractors, after the 19th November, 1893, might have declined to undertake the care and preservation of the vessel, until the United States was able to furnish the armor for it. They might have required the United States to remove the vessels from their shipyards, so as to allow them the free use of the yards for other work. They might themselves have removed the vessel to the League Island Navy Yard, and informed the United States of it, saying that they needed their shipyard for other work, but they would be ready to fit the armor whenever it was supplied by the United States. Suppose this had been done, and the two years had then elapsed during which time the United States had not been able to furnish the armor, surely the vessel would have to be protected, cleaned, painted, and the shipyard maintained and kept up, and the insurance on the vessel paid by some one, and the wharfage for the vessel provided at the expense of some one. At whose expense? Is it true, then, as stated in the opinion of the court, that the claims for such outlays would have arisen under or by virtue of this contract. Can it be fairly insisted that "without it (the contract) no such claims could have arisen." If the vessel had spent the two years at the shipyard of any other persons than the Cramps—if any

other shipbuilder had agreed to take care of it during these two years; and he had expended exactly the amounts, and for the objects set forth on page 23 of the record, would he not have had just and proper claims against the United States, and would such claims have arisen under or by virtue of this contract?

The eleventh finding of fact is:

> "During the two years delay, the claimants were required to, and did keep the vessel insured for the benefit and protection of the United States."

Of course the United States could not *require* the claimant to do anything of the kind, claimant had to keep it insured during the three years of the contract, but it will hardly be contended that if the United States delayed ten years in getting the armor, they could have "required" claimant to have kept the vessel insured during all that time. "Required" here, means requested.

Now, is it ingenuous, reasonable, or fair to say, and to assign it as a reason for the judgment announced, that these claims were under or by virtue of or had any connection with the contract.

No provision of the contract can be indicated by which such expenditures as those made by these claimants, were contemplated, or provided for. The third article of the contract, justly considered, excludes such construction. By that article the contractors, in just the exigency that arose here, were allowed to require the United States to accept the vessel, without the armor, and as a consequence, defray all the expenses of its future care and preservation.

The claims here asserted in these causes arose out of an implied contract which was not formed until after the expiration of the formal sealed contract, on which, the opinion asserts "this case turns." Just how these two transactions are connected, with each other, or how

the latter was "by virtue of" the former, is not indicated in the opinion of the court.

The case of Lawson *vs.* The Wallasey Public Board, 11 Queen's Bench Division, page 229, affords a striking analogy to the facts of these causes, and the opinion of the court delivered in 1883, by Lord Denman is in striking contrast with the opinion here, in its method of construction. In that case Lawson had contracted with the board to dredge the bed of a river in a stated time, for which he was to receive £5,000. A certain staging, erected by a former contractor, stood in the way of the work, and the contract provided that the board should remove it in due time, and that if it was not removed in time to allow Lawson to complete his contract in the time stated, that the contract period would be extended. A further provision was—

> "if any difference shall arise between the local board and the contractor, concerning the work hereby contracted for, or any part thereof, or *concerning anything in connection with this contract*, such difference shall be referred to the engineer, and his decision thereon shall be final and binding on the local board and the contractor."

The staging was not removed in time, and Lawson claimed damages for the injury to which he was subjected by the delay. The engineer undertook to decide the matter; Lawson brought suit to recover the amount of his damages. The local board contended that the engineer's decision should be final between the parties, because the claim "was in respect of a matter in connection with the original contract." But the court, speaking through Lord Denman, said:

> "We think there are two clear answers to this contention. First, we think that such a dispute is not 'a difference concerning a thing connected with the contract.' When the parties contracted

> they never contemplated that the engineer would have to decide any such dispute. The dispute is one arising from a breach of an implied contract which is not a part of, or necessarily connected with, the contract under seal. In order to bend a contractor to the certificate or decision of an architect or engineer appointed by the party for whom the work is done, there must be very conclusive language in the contract."

In the case at bar, it is far more manifest that the claim asserted by the claimant has no connection with any undertaking to be done or performed by him, under the provisions of the sealed contract. The provisions of that contract are stated clearly and distinctly in numbered paragraphs. Each expresses its own distinct feature and terms. No one of these can be tortured into embracing expenditures to be made by the contractors, for the care and preservation of the vessel during an indefinite period, in which the United States may be trying in vain, to obtain the armor which it had contracted to furnish within the three years of the life of the contract. Surely it is plain to the ingenuous and right seeking mind, that these expenditures were not on account of anything connected with the sealed contract—that they are not damages suffered by the contractors by reason of "delay caused by the government" or for a change in the specifications or for any "breach by the government of that contract" and, that not arising out of the contract, they were not embraced in the "release executed by the building company on May 18, 1896" on which it is said "the case turns."

Petitioners respectfully urge that the implied contract under which they advanced $177,823.55 for the use and benefit of the United States, for the care, preservation and maintenance of the vessel, for two years after the expiration of their contract, had no connection with the

sealed contract under which they had built the vessel, but constituted of itself an independent and distinct cause of action. That they stand as to this claim in the same relation to the United States that any other person would stand, who, having had no contract with the Government for the building of the vessel, had yet, at the request of the Government laid out his money for the care and preservation of the property of the Government.

The opinion further says:

> "As bearing upon this matter it may be noticed that while the release was signed and the contract between the building company and the Government closed on May 18, 1896, this action was not brought until August 10, 1897, nearly a year and a quarter thereafter."

The only warrant for this statement, or rather for the inference which it is intended shall be drawn from it, was a statement made at the bar by one of the counsel for the United States, to the effect that these claims were an afterthought—were not thought of until long after the date of the release.

It might be a proper and adequate reply to say that under the law these claimants had six years within which to assert their claims in the courts, and that no presumption against them is warranted by their exercising a right so derived. It might be further met by a *tu quoque*, in this, that when the suit was brought the defendant did not then or at any time later plead this alleged release, in bar of the plaintiff's demand, but that such ground of defense was an "afterthought."

But the real and substantial reply to the intimation is that it is not true in point of fact, as the public records abundantly attest. Within a very few days after the date of the alleged release, viz, May 18, 1896, these claimants did lay the matter before Congress, and asked that the Secretary of the Navy be empowered by an act of Con-

gress to adjust and settle the claims of these claimants, and Congress did in response to that request, enact as follows by act approved June 10, 1896:

> "The Secretary of the Navy is hereby authorized and directed to examine claims against the Government, which may be presented to him by contractors for the building of hulls or machinery of naval vessels under contracts completed since January 1, 1891, where it is alleged that contractors have been subjected to loss and damage through delays in the work under said contracts, which were not the fault of said contractors, but were due to the action of the Government, and to report to the next session of Congress, the result of said investigation, and whether said claims are, in his opinion, subjects for the jurisdiction of the Court of Claims, or for the action of Congress upon the same."

Chapter 399, 29 Statutes, p. 374, approved June 10, 1896. This was only twenty-two days after the date of release.

The Secretary of the Navy did make his report to Congress bearing date December 8, 1896. It may be seen in full on page 38 of the brief for Cramp Company of Mr. John C. Fay. We commend that report to the attention of this court, for this, that, while the Secretary does refer to the amended contract of May 10, 1894, as containing a release of claims by the contractors, he nowhere, by any intimation, refers to the receipt of May 18, 1896, as containing any release of any claims whatever. Surely he, the officer who prepared that instrument, and knew what was intended by it, would not have failed to call attention to it, if he had supposed that it had any such significance as the court has attached to it. The Secretary does advise that the claims be referred to the Court of Claims and that justice so demands. As Congress took no further definite action upon it, as soon

after Congress adjourned as was at all practicable the claimants brought their suit in the Court of Claims, as suggested by the Secretary's report. And this disposes of the insinuation that claimant's suit was an afterthought, but it suggests another presumption that is more creditable, and more worthy of consideration. Why did the Secretary of the Navy advise that these cases be sent to the Court of Claims, if he knew, or thought, or had intended by the receipt of May 18, 1896, that it should operate as a release of these very claims. With what show of reason can it be now held that such was the intended purpose and effect of that instrument, when the author of it, who was the officer of the Government most concerned in it has by his conduct and official report disclaimed any such intent or meaning? This same Secretary was also the author of the instrument dated May 10, 1894, which was the one really relied on by the counsel of the Government, as effecting a release of part of these claims. If this Secretary intended the latter instrument to have the same effect as the earlier, why did he employ such different terms and language in the two instruments? It is worthy of note that in the one of May 10, 1894, the language is:

> ". . . the party of the first part hereby releases the party of the second part from all *and every claim for loss or damage hitherto sustained* by reason of any failure on the part of the party of the second part to comply with its contract, or on account of any delay hitherto occasioned by the action of the party of the second part."

While the language of the instrument of May 18, 1896, is that the claimant—

> "does hereby remise, release and forever discharge the United States of and from all, and all manner of debts, dues, sum and sums of money, accounts reckonings, claims and demands whatsoever, in

law or in equity, for or by reason of, or on account of, the *construction of said vessel under the contract aforesaid.*

It is doing violence to language and is at war with fair dealing to insist that the claims here demanded were "on account of the construction of said vessel under the contract aforesaid." They plainly had no connection with the construction of the vessel, but accrued after the said vessel had been constructed, so far as the work of the contractors was concerned. Why should the Secretary report that he had a partial release, and suppress a total release? So, too, they were not incurred by reason "of any failure on the part of the party of the second part to comply with its contract, or on account of any delay hitherto occasioned by the action of said party of the second part." Doubtless, if the United States had not delayed to furnish the armor, they would have furnished it, and had they furnished it, the delay of two years, during which period these expenses were made necessary, would not have occurred. But the claims here asserted are not for *damages* in any proper, legal sense—that is, they are not for breach of the contract by the United States, nor for any tort committed by the United States. They are for money paid, laid out, and expended by these claimants, at the request of the United States, and for its use and benefit.

Because great wrong and injury will be done to these petitioners by the opinion and judgment announced, they pray that the causes may be reheard.

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